IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,

VERSUS

PAUL GREIMANN,
Appellee.

PETITION OF APPELLANT, BYRON W. WOOD, FOR REHEARING

JAMES R. EAGLETON,
Hales Building;

CHARLES E. MCPHERREN,
708-709 Perrine Building,
Oklahoma City 2, Oklahoma,
Counsel for Appellant.

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KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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Comes now the appellant, Byron W. Wood, and as his petition for rehearing herein, states that heretofore this Honorable Court, on January 19, 1948, filed an opinion and rendered a judgment and decree herein, affirming the judgment and decree of the District Court of the United States for the Territory of Alaska, Fourth District, wherein

the probation of a certain letter as the will of J. M. Pearl, deceased, was affirmed. That said opinion, judgment and decree so affirming said judgment and decree of the District Court, is erroneous and prejudicial to the rights of the appellant, and that, in rendition of the same, the Court overlooked the following controlling uncontroverted facts and applicable principles of law which were duly presented on the part of the appellant:

I. That the statement in said opinion is correct that:

"It appears that appellee, when a lad of 18 years, met Pearl, some 20 years his senior, in the City of Chicago. They became friends and resided together in Chicago for three years. Pearl and appellee then moved to Alaska and became associated in a garage business under the name of Pearl and Pearl. Appellee addressed Pearl as 'Dad'; this form of salutation was used by appellee at Pearl's request and in turn Pearl addressed appellee as 'son.' The garage business partnership continued for seven years.

"Because of illness Pearl journeyed to Washington, D.C., and was admitted to the Veterans' Hospital in that City. Sometime prior to September 26, 1931, an order discharging Pearl from said hospital seems to have been made, but according to the letter dated September 26, 1931, written by Pearl to appellee, said order of discharge had been revoked and Pearl had been transferred to a different hospital where he had undergone a number of physical examinations. In the letter of September 26, 1931, he described in detail a number of subjective symptoms and concluded the letter in the words hereinbefore set out. Pearl recovered his health and returned to Alaska where he remained until illness required him to return to the mainland some ten years later. He died July 9, 1944, in the Veterans' Hospital at Muskogee, Oklahoma. He left no will other than the bequest contained in the said letter of September 26, 1931."

However, the Court overlooked the controlling effect of the following uncontroverted facts:

1. That at the time said letter was written Pearl and Greimann were partners as to all their property and belongings and same was in the possession and control of Greimann, and in that situation, the terms of the letter were such as might be expected; however, said partnership had been dissolved sometime before Pearl left Alaska and Pearl and Greimann had no mutual property interests for sometime before Pearl left Alaska and returned to Oklahoma.

2. That four years before his death Pearl returned to Oklahoma, purchased a place and rejoined his wife and brother, Byron W. Wood, and the relationship between Pearl and Greimann changed entirely and communication between them during said four years consisted of only one letter and post card and had entirely ceased sometime before Pearl's death in Oklahoma.

3. That said letter was written some thirteen years before the death of Pearl and, although he and Greimann were together in Alaska for approximately nine years after Pearl's return to Alaska, before Pearl departed for Oklahoma, said letter was never referred to or discussed by either, and the assumption must be that same was forgotten.

4. That Greimann, the recipient of the letter, after learning of the death of Pearl in Oklahoma, did not institute proceedings to probate said letter as the will until he

had concluded that the said brother, Byron W. Wood, in Oklahoma, did not intend to claim his estate. This failure evidences the fact that Greimann did not regard the letter as an unconditional will (see Tr. 66-73, herein).

II. In the opinion the Court further concludes:

> "Appellant repeatedly makes reference to an impending operation in support of his argument that the bequest was contingent upon decedent's recovery from an operation, if performed, but as we read the record such a statement finds no support therein. We find in the record no reference that an operation had been advised or contemplated by attending physicians. We think the reference to an operation came into the mind of Pearl because he considered it the only agency which might cause death after the thought of death was suggested by the request of the hospital authorities to give the name of the nearest of kin to be notified in case of death. Naturally that request brought to mind the necessity of providing for disposition of his estate. He thought of appellee over all of those bearing a blood relationship. His thoughts were not of a brother in Oklahoma but of 'Dear (Boy) Paul.' That association of appellee and Pearl had been such that it is logical to conclude that Pearl desired appellee to be the recipient of his property at his death, no matter when it occurred or in what manner occasioned."

While it is true that the said letter in specific terms does not refer to an expected operation, it does in detail state the most serious symptoms and condition of its author and that the physicians and surgeons were going to the bottom of things and had requested him to give references to his next of kin in case of death. Certainly, in this situation, as the Court states in the opinion, naturally Pearl Also reasonably he thought of his partner and partnership contemplated an operation and that death might result.

business in Alaska, and the most natural and reasonable course in this crisis was to write the letter and explain his critical situation and desires as follows:

> "We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, and *in case I die if they do operate I bequeath you* my belongings and property all except $100.00 to be given to Robert Galligher to help him in his education. I would ask to be buried here in Arlington Cemetery. *I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly*" (Tr. 5 and 6).

The fact is most respectfully suggested that the use of language better calculated to express the belief that an operation was impending is hardly possible.

It is also true in that most critical situation he thought of Greimann, his partner, as to the ownership of all his property and business and who, in the case of an operation and resulting death, would have the task of carrying on. It is his desire that, in the *contingency of an operation and resulting death*, and consequent failure to return to Alaska, that Greimann have his property and bury him in Arlington; however, as he states therein:

> *"I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly."*

Frankly, we respectfully urge that the contingency could hardly be more clearly stated.

It is true that the association of Pearl and Greimann, both socially and in partnership business, at the particular time of the said critical emergency, during which said letter

was written, impelled Pearl to conditionally bequeath to Greimann his said property so owned in partnership, *only, as Pearl specifically states therein, "in case I die if they do operate."* Holding in mind the precarious physical condition of Pearl at the time, his belief that an operation was impending, his fear that he would not survive to return to Alaska, and his business situation, the writing of such letter to his then associate and partner in preparation for such contingency was most natural. The applicable rule as to such letters in the nature of holographic wills, being usually of a temporary nature, is to consider all the facts and circumstances existing at the time the letters are written, and subsequently occurring changes in the relationship and attitude of the parties, in determining as to whether the operation of same as wills should be permanent or contingent (see Pages 24-51, appellant's brief herein for presentation of all the points herein).

Considering this simple and clearly contingent language, it is evident the Court's conclusion that Pearl thereby meant "appellee to be the recipient of his property at his death, no matter when it occurred or in what manner it occurred," resulted from the Court's overlooking the following settled and applicable rules:

> "(1) Where the word 'if' is used in a testamentary instrument, as in the case at Bar, to introduce a specifically stated condition or event, the word must be held to mean 'in that case' and to express the condition or event which must arise or occur as a condition precedent to the operation of the instrument as a will" (see Pages 36-51, brief of appellant herein).

(2) Where, as in the case at Bar, the language of the testamentary instrument is plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary (see Pages 60-61, brief of appellant herein). There is no suggestion or contention and none are warranted that the language of the letter is in any degree uncertain or ambiguous in its meaning. No reason, legal or otherwise, appears for eliminating by construction the specific contingencies in the language, "in case I die if they do operate, I bequeath you my property, etc." It is urged that said conclusion, in the face of such clear contingent words, to be absolute and unconditional is erroneous. To justify this conclusion of the Court the words, "in case I die if they do operate," must have been for some reason stricken. Since the bequest could not operate until after death, same must have been considered surplusage.

(3) In the opinion, the Court further states:

> "In speaking of the operation Pearl was merely speaking of the circumstances which induced him to make the testamentary disposition. In so construing the language of the letter we are in accord with the tendency of the courts to construe similar language as the reason for executing a will rather than as a precedent to its validity if such a construction can reasonably be made" (Page on Wills, Lifetime Edition, Vol. 1, Sec. 96, Pp. 209, 210).

It is true that in Sec. 96, Page on Wills, it is in substance stated that the tendency is to treat the statement of circumstances which induced the making of a testamentary disposition as the reason for executing the will rather than as a precedent to its validity where such construction does

not do violence to the clear meaning of the language employed; however, Page clearly states the rule to be that the clear meaning of the language used must control (see Pages 13-15, appellant's reply brief herein where Page and other authorities are presented).

That in so construing the language of the letter, which is, "in case I die if they do operate, I bequeath you, etc." to be "merely speaking of the circumstances which induced him to make the testamentary disposition" *the Court overlooked the controlling fact that such language specifically states that the bequest is "in case I die if they do operate," which is a specifically stated condition and not a reference to a mere inducement.*

That in so construing said language the Court overlooked the fact that said events, being the operation and resulting death, are so clearly stated as the reason for the letter and the bequest is so clearly made contingent upon said events, and same are so interrelated and dependent, that the operation of the letter is conditioned upon the happening of the specifically stated events. Such is the holding of all the authorities (Reference is made to Pages 24-54, appellant's brief herein, where said rule is fully presented with supporting authorities).

(4) In the opinion herein, the Court further states:

> "Furthermore such a construction follows the rule that intestacy is not favored."

While the general rule is that intestacy is not favored, *it is also a well recognized rule that where, as in the case at Bar, the language of the testamentary instrument is*

plain and clear, both in its expression and in its meaning, the application of rules of construction is unnecessary (see cases cited and presented on Pages 61-62, appellant's brief herein).

Further, such presumption has no application to the case at Bar, in that the same applies only where the question is as to whether or not all of the property of the estate is devised and not as to whether the language of the instrument is or is not contingent, and has no application as against the presumption that the author of the letter did not intend to disinherit his legal heirs. Sec. 1147, Page 95, 69 C.J., cited in the opinion, supports the above statement. *The clear and unambiguous language of the letter leaves no toe-hold for construction or presumption.* The contingent language "in case I die if they do operate I bequeath you" could possibly have but one meaning.

(5) In the opinion herein the Court further states:

> "Instances of wills containing words of clear condition, if literally construed, which were none-the-less held to be absolute and valid are":
>
> *In re: Kayser's Estate* (Pa. Orph.), 38 Burkes 205;
>
> *In re: Fouquer's Estate* (Pa.), 66 Atl. 92;
>
> *Eaton* v. *Brown*, 193 U.S. 411, 24 S. Ct. 487, 48 L. ed. 730.

In so stating that the wills involved in said above cases contained words of clear condition, if literally construed, the Court overlooked the controlling fact in each case that the language involved therein did not refer to the stated events as specific contingencies or conditions precedent to the operation of the instruments as wills, as does the language presented in the case at Bar.

In re: Kayser's Estate, supra, the language is:

> "In case something should happen to me before I have a chance to see Mr. Trexler, this is my last will and testament."

Obviously, this was not the expression of a specific contingency that if he did see Trexler the will was inoperative and the holding of the court was *that the language used did not specifically make death before the testator had a chance to see Mr. Trexler as a condition precedent to its operation.*

In re: Fouquer's Estate, supra, the pertinent language was:

> "Should anything befall me while away or that I should die, then, in that event, all my estate, etc."

That such language contained no specific statement that the will should not be operative unless something should befall the testator or that he should die on the trip, is evident and was the conclusion in the opinion. *The facts and holdings in this case are fully presented on Pages 30-34 of Appellant's Brief, and it appears from the opinion therein that same is against the contention of appellee and supports that of appellant.*

In *Eaton* v. *Brown, supra,* the pertinent language is:

> "I am going on a journey and may not ever return. If I do not, this is my last request."

Same does not specifically state that failure to return was a specific precedent contingency to the operation of the will, *as did the pertinent language in the case at Bar make death from the expected operation such condition preced-*

ent. This *Eaton case* is fully presented on Pages 52-54, Appellant's Brief herein, and when the language presented in the *Eaton case* and in the case at Bar is carefully analyzed, and the authorities and reasoning in the *Eaton case* applied to the language involved in the case at Bar, it will be clear that the *Eaton case* supports appellant's contention. Some of the pertinent reasoning in this *Eaton case* is as follows:

> "There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, *the primary import of isolated words may be held to be modified and controlled by the dominant intention, to be gathered from the instrument as a whole.*"

We should bear in mind that the contingency expressed in the letter in the case at Bar was not in the nature of "isolated words." The contingency expressed was the "dominant intention." On the other hand, the language used is clear and specific and "unmodified" and "in case I die if they do operate, I bequeath you," etc.

In this opinion, it is further stated:

> "*We need not consider whether, if the will had nothing to qualify these words, it would be impossible to get away from the condition.* But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipworth* v. *Cabell,* 19 Gratt. 758, 783. *And then she goes on to say that all she*

has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property; not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty—an hypothesis which is to the last degree improbable in the absence of explanation—it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which, on the face of it, has reference to an unconditioned gift."

It thus appears that the Court in this *Eaton case* bottomed its conclusion on considerations presented in the will other than the above quoted language, while in the case at Bar there are no such considerations and the language is specific and contingent.

In the opinion in the *Eaton case* the court discusses some of the leading cases as follows:

"It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, 'my wish, desire and intention now is that if I should not return (which I will, no preventing Providence).' *Todd's Will*, 2 Watts. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word 'now.' Somewhat similar was *Porter's Goods*, L.R. 2 Prob. & Div. 22, where Lord Penzance said, if we correctly understand him, that, if the only words adverse to the will had been 'should anything unfortunately happen to me while abroad,' he would have held the will conditional. See *Mayd's Goods*, L.R. 6 Prob. Div. 17, 19."

From this discussion it is evident that the Court in the Eaton case, had the language been that presented in the case at Bar, would certainly have held that his letter was contingent.

In this *Eaton case* the Court closes the opinion with the statement:

> "It hardly is worthwhile to state them at length, as each case must stand so much on its own circumstances and words."

That the concluding above quoted statement in this opinion is also presented in Appellant's Brief herein, *and the Court's attention is respectfully directed to the fact that no authority, rule of construction, or presumption is required to clarify the meaning of such simple English words as "in case I die if they do operate, I bequeath you" etc., as in the letter here involved. Neither contingency so clearly expressed can fairly be discarded.*

The appellant most respectfully but earnestly urges that, in reaching the conclusion that the pertinent language, "in case I die if they do operate, I bequeath you," etc., does not express contingencies as a condition precedent to the operation of the letter as a will, the Court erred and violated the above stated principles of law and the controlling rule that the Court, under the guise of construing an instrument, will not write a new will, and the clear and unambiguous language used by the testator in the instrument must control, and the Court must not construe that language so as to cause same to express what the testator did not intend (see Pages 61-62, appellant's brief herein).

Wherefore, appellant prays the Court to grant a rehearing herein.

JAMES R. EAGLETON,
Hales Building;

CHARLES E. MCPHERREN,
708-709 Perrine Building,
Oklahoma City 2, Oklahoma,
Counsel for Appellant.

FEBRUARY, 1948.

CERTIFICATE

James R. Eagleton and Charles E. McPherren, counsel of record for appelant, hereby state and certify that in our judgment the above petition for rehearing in the above cause is well founded and that same is not filed for delay.

JAMES R. EAGLETON,

CHARLES E. MCPHERREN,
Counsel for Appellant.

FEBRUARY, 1948.